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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-571**

PEOPLE OF THE STATE OF ILLINOIS,
*Petitioner,*

*vs.*

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
*Respondents.*

## PETITIONER ILLINOIS' REPLY TO THE RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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## PETITIONER ILLINOIS' REPLY TO THE RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

### REASONS FOR GRANTING THE WRIT.

I.

**THE COURT OF APPEALS' IMPOSITION OF A LEVEL OF TREATMENT WHICH THAT COURT PRESUMED WAS SUFFICIENT TO DESTROY VIRUS HAD NO BASIS IN THE RECORD.**

As set forth in Illinois' petition, there was ample evidence to support the effluent limitation imposed by the district court to destroy disease-causing virus in the sewage. (Illinois petition pp. 11-14, 20-23). Under a proper application of the clearly

erroneous standard of Rule 52, Fed. R. Civ. P., the district court's order should have been sustained. The Court of Appeals' failure to apply this standard to the evidence supporting the district court's remedy—while applying the proper "clearly erroneous" standard to the question of liability—is a major issue which should be resolved by this Court.

But even more critical an error was the Court of Appeals' adoption of an effluent limitation ("30/30") on the basis of the wholly unsupported presumption that EPA and the State of Wisconsin had studied the viral destruction efficacy of that limitation. Absolutely nowhere in the record is there a shred of evidence that EPA and Wisconsin had made any analyses of viral removal with 30/30 effluent or had even considered virus.

In contrast to the appellate court's extra-record presumption, the district court had ample evidence to support its finding that 30/30 with combined chlorine would not destroy virus. The district court made an explicit finding of fact:

> "The defendants attempt to conform their effluent to a standard of 30 parts per million of suspended solids and BOD, but they rarely achieve that standard and concede that before they can meet it with any consistency a substantial amount of additional plant renovation and updating will have to be done; but even if a 30/30 standard were met, it is my finding that that standard would still result in the discharge of staggering numbers of pathogens to Lake Michigan."
>
> Appendix F-6

The evidentiary basis of this finding came from the testimony of one of U. S. E. P. A.'s top experts on virus and public health, Dr. Gerald Berg, who testified for plaintiffs. Dr. Berg testified that his experience with full scale secondary biological sewage plants showed viral destruction of zero to fifty percent. But as Dr. Berg pointed out—even at the alleged 99% removal rate claimed by the defendants' virus expert—the resultant discharge by Milwaukee would be billions of infectious virus per day. (See discussion and references in Illinois' petition.)

For the Court of Appeals to blindly adopt a totally unsupported numerical limitation on the basis of *presumed* consideration by silent and absent agency officials is wholly impermissible —particularly where, as here, public health is at stake. Wisconsin officials—either independently or at Milwaukee's behest—never once communicated their purported concerns regarding virus removal to the district court in the five years this case was before the district court. EPA never submitted any evidence that a "30/30" effluent limitation was effective in destroying virus. Indeed, EPA supplied Illinois with EPA's top expert on virus—Dr. Berg—who testified that a secondary biological effluent (i.e. "30/30") was very ineffective in destroying virus.

Illinois believes that more than ample evidence existed to support the effluent limits imposed by the district court under a proper application of the "clearly erroneous" rule. However, if this Court believes that the question of the proper level of treatment to destroy virus needs further evidentiary development, then the proper course is to remand to the district court for such evidentiary proceedings. The Court of Appeals' action in unilaterally adopting the extra-record presumption that 30/30 would destroy virus was improper.

Indeed Milwaukee erroneously contends that "30/30" remains an immutable and universal requirement no matter what the condition and use of the receiving water. But as Illinois noted in its petition, even the Clean Water Act treats "30/30" secondary treatment as a baseline and allows more stringent water quality related effluent limitations to be imposed on discharges to high quality bodies of water such as Lake Michigan. 33 U. S. C. § 1313.

Thus it is not anomolous for the Illinois agency to recommend less restrictive standards[1] for a flowing river such as the

1. Contrary to the implication given by Milwaukee the district court below did not order Milwaukee to install carbon adsorption filters. Indeed the district court expressly excluded such treatment and ordered low cost sand filtration. Appendix D-5.

Illinois—which is not used for swimming or public water supplies—and a much more stringent limitation on dischargers to Lake Michigan—which is a very high quality swimming and public water supply resource. Moreover, even if the Illinois administrative agencies gratuitously issued effluent limits as lenient as Wisconsin's, that would not prevent the Illinois Attorney General from seeking a judicial order imposing more stringent limits on either interstate or intrastate polluters. Indeed the Illinois legislature has given express statutory recognition to this authority. *See, People ex rel. Scott* v. *United States Steel Corporation,* 40 Ill. App. 3d 607, 352 N. E. 2d 225, 228 (1976).

II.

**ILLINOIS DOES NOT SEEK TO RELITIGATE LIABILITY—THAT ISSUE HAS BEEN DECIDED AGAINST MILWAUKEE. RATHER ILLINOIS SEEKS TO HAVE THE DISTRICT COURT'S REMEDY UPHELD UNDER THE "CLEARLY ERRONEOUS" RULE OR TO HAVE THE EFFLUENT LIMITS REMEDY REMANDED TO TEST THE EVIDENTIARY BASIS OF THE REMEDY ORDERED BY THE COURT OF APPEALS.**

Contrary to Milwaukee's colorful colloquy, Illinois is not seeking to relitigate this case. Milwaukee forgets that:

1. The district court found in Illinois' favor on the question of *liability.* The Court of Appeals affirmed.

2. The district court ordered a remedy requiring the collection and treatment of raw sewage. The Court of Appeals affirmed.

3. The district court ordered a remedy requiring effluent limits sufficient to destroy virus. The Court of Appeals not only rejected evidence sufficient to sustain that order under the "clearly erroneous" rule but went further and adopted its own treatment requirement without any evidence and on the basis of extra record presumptions.

Illinois is not seeking to relitigate the issue of liability. That would be improper. Nor is Illinois seeking to relitigate a remedy ordered by the district court—although changed conditions can support a request to modify a remedial order. Indeed the Judgment Order below specifically provides for modification if subsequent innovation or engineering design develops better or more economical techniques for achieving the same level of disinfection or collection.

What Illinois challenges here is not a district court order based on evidentiary hearings, but rather a Court of Appeals remedial order which conflicts with the uncontroverted evidence in the record and which relies on unfounded extra-record presumptions. At the very least the Court of Appeals should have remanded for further evidence on the level of treatment necessary to destroy virus.

## III.

## STATE STATUTORY AND COMMON LAW REMEDIES CO-EXIST AND COMPLEMENT THE FEDERAL SCHEME.

Milwaukee and its amici have hoist themselves on their own petard. They have argued themselves into a logical conundrum.

First they argue that the Clear Water Act has preempted or replaced the federal common law of nuisance. Second they argue that the federal common law of nuisance has preempted all claims for relief made under state statute or state common law. But their arguments ignore the explicit and repeated recognition by Congress in the Clear Water Act that state statutory and common law remedies were to be preserved. If the Clean Water Act has indeed precluded the use of federal common law nuisance, that very same Act has reemphasized the right of States to invoke State statutory and common law remedies.

In fact, none of these various remedies are mutually exclusive and all of these remedies should be available to meet localized conditions and the needs of special high quality waters. *Cf.*, *Washington* v. *General Motors Corp.*, 406 U. S. 109, 112 n. 2, 115-16 (1972).

## CONCLUSION.

The State of Illinois respectfully submits that the Writ should issue as prayed for in its Petition herein.

Respectfully submitted,

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